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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. ~~895~~ 35

CHARLES KATZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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TABLE OF CONTENTS

	Page
Jurisdiction	2
Statement of the Case	2
Questions Presented	3
Statutes and Constitutional Provisions Involved	4
Statement of the Facts	4
Reasons For Granting the Writ	5
Argument	6
1. Whether Evidence Obtained By Attaching An Electronic Listening And Recording Device To The Top Of A Public Telephone Booth Used And Occupied By The Defendant Is Obtained In Violation Of The Fourth Amendment To The United States Constitution	6
A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.	6
B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.	6
2. Whether The Search Warrant Used By The Federal Officers In The Instant Case Violated The Fourth Amendment To The United States Constitution In That Said Warrant Was (A) Not Founded On Probable Cause; (B) An Evidentiary Search Warrant And (C) A General Search Warrant	8
3. (A) Whether The Finding Of Guilty As To All Counts In The Indictment Was Erroneous In That Only One Offense, If Any, Was Committed By Petitioner And (B) Whether The Indictment	

Page

Was Defective In Alleging In Multiple Counts A Single Violation Of Title 18, U.S.C. §1084 ... 9

4. Whether The Statute Under Which Petitioner Was Convicted Is:
   A. Unconstitutionally vague and
   B. Unconstitutional in violation of Amendments I and V to the United States Constitution 9

5. Whether As A Matter Of Fact And Law, The Evidence Was Insufficient To Sustain The Conviction Of Petitioner And Petitioner's Motion For A Judgment Of Acquittal Was Erroneously Denied 12

Appendix A 14

Appendix B:

Appeal from the United States District Court for the Southern District of California, Central Division .. 15

I. Recording of Phone Booth Conversations 19

II. The Search Warrant 22

III. The Indictment 24

IV. Constitutionality of 18 USC 1084 25

V. Sufficiency of the Evidence 26

Appendix C(a):

§1084. Transmission of wagering information; penalties 27

Appendix C(b):

Amendment I — Freedom Of Religion, Speech And Press; Peaceful Assemblage; Petition Of Grievances 29

Appendix C(c):

Amendment IV — Searches And Seizures 30

Appendix C(d):

Amendment V — Capital Crimes; Double Jeopardy; Self-Incrimination; Due Process; Just Compensation For Property 31

Table of Citations

Cases

Page

Bell v. *United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed. 905 (1955) 9

Conally v. *General Const. Co.,* 269 U.S. 385, 46 S.Ct. 126, 127, 70 L.Ed. 322 (1926) 10

Giaccio v. *Pennsylvania,* 382 U.S. 399, 86 S.Ct. 518, 15 L.Ed. 2d 447 (1966) 10

Goldman v. *United States,* 316 U.S. 129, 62 S.Ct. 993, 86 Fed. 1332 (1942) 5

Griswold v. *Connecticut,* 381 U.S. 479, 85 S.Ct. 1678, 14 L.Ed. 2d 510 (1965) 7

Lamont v. *Post Master General,* 381 U.S. 301, 85 S.Ct. 1493, 14 L.Ed. 2d 393 (1965) 11, 12

Marcus v. *Search Warrants,* 367 U.S. 717, 81 S.Ct. 1708, 6 L.Ed. 2d 1127 (1961) 8

Olmstead v. *United States,* 277 U.S. 438, 48 S.Ct. 564, 72 L.Ed. 944 (1928) 6

Silverman v. *United States,* 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed. 2d 734 (1961) 5, 6, 7

Speiser v. *Randall,* 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed. 2d 1460 (1958) 11

Stanford v. *Texas,* 379 U.S. 476, 85 S.Ct. 506, 13 L.Ed. 2d 431 (1965) 8

Thomas v. *Collins,* 323 U.S. 516, 65 S.Ct. 315, 89 L.Ed. 430 (1945) 11

United States v. *Bergland,* (C.A. Wis. 1963) 318 F.2d. 159, Cert. Denied, 375 U.S. 861, 84 S.Ct. 129, 11 L.Ed. 2d 88 10

United States v. *Carolene Products Co.,* 304 U.S. 144, 58 S.Ct. 778, 82 L.Ed. 1234 (1938) 11

United States v. *Paroutian,* 299 F.2d 486 8

United States v. *Simon,* (C.A. Wis. 1957), 241 F.2d 308 12

Page

West Virginia State Board of Education v. *Barnette*, 319 U.S. 624, 63 S.Ct. 1178, 87 L.Ed. 1629 (1943) 11

Statutes

Federal Rules of Criminal Procedure, Rule 12 2
Internal Revenue Code, Section 4401 12

United States Code
Title 18, § 1084 ..... 2, 3, 4, 9, 10, 11, 12
§ 1952 9
Title 28, § 1254(1) 2
§ 1291 2
§ 1294 2

Constitutional Provisions

Article IV, Section 2 11
First Amendment 3, 4, 9
Fourth Amendment 3, 4, 5, 6, 7, 8
Fifth Amendment 3, 4, 8, 9

In the
Supreme Court of the United States

OCTOBER TERM, 1966

No.

CHARLES KATZ,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT, JUDGMENT AFFIRMING JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF CALIFORNIA, CENTRAL DIVISION

This is a Petition of Charles Katz for Writ of Certiorari to review the judgment and order made by the Court of Appeals for the Ninth Circuit affirming the judgment against Charles Katz made and entered by the United States District Court for the Southern District of California on May 20, 1965.

A copy of the affirming judgment and of the opinion of the Court of Appeals for the Ninth Circuit, which are as

yet unreported, are attached. (Appendices A and B, respectively.)

Jurisdiction

The District Court had jurisdiction in this case under Title 18 U.S.C. §1084.

The Circuit Court had jurisdiction under Title 28 U.S.C. §1291 and §1294.

This Court has jurisdiction under Title 28 U.S.C. §1254 (1) to review the judgment in question.

Statement of the Case

On March 17, 1965, an eight-count indictment was filed against Charles Katz. Each count of the indictment charged a violation of Title 18, U.S.C., §1084 [interstate transmission of bets and wagers and information assisting in the placing of bets and wagers]. Each of said counts involved violations of §1084 on different dates or at different times on the same date.

Prior to the trial of the within matter, Petitioner filed a Motion to Suppress Evidence and for Return of Evidence, which motion was denied. Subsequently, Petitioner moved to dismiss the indictment, pursuant to Rule 12 of the Federal Rules of Criminal Procedure, which motion was also denied.

Thereafter, Petitioner entered a plea of not guilty and a trial by court, the Honorable Jesse Curtis, Judge Presiding, was held. On May 20, 1965, the court found Petitioner guilty on all counts as charged. Petitioner's motions for a new trial and for a judgment of acquittal were denied; whereupon, Petitioner was fined the sum of $300.00. Thereafter, Petitioner filed a Notice of Appeal.

On November 17, 1966, the Court of Appeals for the Ninth Circuit affirmed the decision of the District Court.

Questions Presented

1. Whether evidence obtained by attaching an electronic listening and recording device to the top of a public telephone booth used and occupied by the Petitioner is obtained in violation of the Fourth Amendment to the United States Constitution.

   A. Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening recording device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.

   B. Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.

2. Whether the search warrant used by the Federal officers in the instant case violated the Fourth Amendment to the United States Constitution in that said warrant was (a) not founded on probable cause; (b) an evidentiary search warrant and (c) a general search warrant.

3. (a) Whether the finding of guilty as to all counts in the indictment was erroneous in that only one offense, if any, was committed by Petitioner and (b) whether the indictment was defective in alleging in multiple counts a single violation of Title 18, U.S.C. §1084.

4. Whether the statute under which Petitioner was convicted is:

   A. Unconstitutionally vague and

   B. Unconstitutional in violation of Amendments I and V to the United States Constitution.

5. Whether as a matter of fact and law, the evidence was insufficient to sustain the conviction of Petitioner and Petitioner's motion for a judgment of acquittal was erroneously denied.

Statutes and Constitutional Provisions Involved

The relevant constitutional and statutory provisions are printed in Appendix C; they are:

Title 18, U.S.C., §1084; Amendments I, IV and V to the United States Constitution.

Statement of the Facts

A substantial portion of the evidence introduced against the Petitioner in the trial court was obtained by agents of the Federal Bureau of Investigation by recording conversations that were had by the Petitioner in a public telephone booth. The conversations were overheard and recorded by means of an electronic device which was attached to the top of the telephone booth. No part of the microphone physically penetrated the telephone booth.

After Petitioner was arrested by the F.B.I. agents, his apartment was searched pursuant to a warrant. The evidence which was seized pursuant to the warrant was procured as a result of the information obtained from the "tap" of Petitioner's telephone conversations.

The expert witness who testified for the prosecution stated that without the transcripts made from the "tap" of Petitioner's telephone conversations, he was unable to determine how much money was wagered by the Petitioner and whether the Petitioner was betting for someone else.

The most that the expert could state was that Petitioner was a professional handicapper; he could not state that he was a bettor. In fact, no prosecution witness could say, without referring to Petitioner's extrajudicial statements, that Petitioner was in the business of betting or wagering. The prosecution's witnesses conceded that the word "handicapper" was not synonymous with being a "bettor".

Reasons For Granting the Writ

While Petitioner considers all questions presented herein substantial, the most important constitutional issue presented by this Petition is as follows: Whether Government agents should be permitted to obtain evidence by use of an electronic listening and recording device attached to the top of a public telephone booth and whether such a booth is a constitutionally protected area. Integrally involved with these questions is the question of whether physical penetration of a constitutionally protected area is necessary before it can be said that the Fourth Amendment's proscription against an illegal search and seizure is applicable. A great deal of confusion and uncertainty exists in the lower Federal Courts and among the practitioners as to whether this Court's decision in *Goldman* v. *United States*, 316 U.S. 129 62 S.Ct. 993, 86 Fed. 1332 (1942) was impliedly overruled in *Silverman* v. *United States*, 365 U.S. 505, 81 S.Ct. 679, 5 L.Ed. 2d 734 (1961) in the area of the Fourth Amendment (Search & Seizure).

Argument

1. WHETHER EVIDENCE OBTAINED BY ATTACHING AN ELECTRONIC LISTENING AND RECORDING DEVICE TO THE TOP OF A PUBLIC TELEPHONE BOOTH USED AND OCCUPIED BY THE DEFENDANT IS OBTAINED IN VIOLATION OF THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

   A. *Whether a public telephone booth is a constitutionally protected area so that evidence obtained by attaching an electronic listening device to the top of such a booth is obtained in violation of the right to privacy of the user of the booth.*

   B. *Whether physical penetration of a constitutionally protected area is necessary before a search and seizure can be said to be violative of the Fourth Amendment to the United States Constitution.*

A substantial portion of the evidence introduced against Petitioner at the trial herein was obtained by F.B.I. agents by use of an electronic listening and recording device which, unknown to Petitioner, was attached to the top of the telephone booth which Petitioner used and occupied. It is submitted that the evidence so obtained should have been ruled inadmissible in that said evidence was obtained pursuant to an illegal search and seizure in violation of Amendment IV to the United States Constitution.

Although this Court in *Olmstead* v. *United States*, 277 U.S. 438, 48 S.Ct. 564, 72 L. Ed 944 (1928) permitted evidence obtained by the use of electronic eavesdropping devices to be introduced at trial, it is respectfully submitted that such evidence is inadmissible under the philosophy recently expressed by the Court in *Silverman* v. *United States*,

supra. The language of *Silverman* indicates that the unrealistic considerations of physical penetration and real property law will not be permitted to cloud the real issue, i.e., whether there has been an illegal search and seizure within the letter and spirit of the Fourth Amendment. In *Silverman,* the Court stated:

> "Here, by contrast, the officers overheard the petitioners' conversations only by usurping part of the petitioners' house or office, a heating system which was an integral part of the premises occupied by the petitioners, a usurpation that was effected without their knowledge and without their consent. *In these circumstances we need not pause to consider whether or not there was a technical trespass under the local property law relating to party walls. Inherent Fourth Amendment rights are not inevitably measurable in terms of ancient nicities of tort or real property law.*" (emphasis added)

If ever there was room for doubt, it can be no longer doubted that the right to privacy has constitutional dimensions. *Griswold* v. *Connecticut,* 381 U.S. 479 85 S.Ct. 1678, 14 L. Ed 2d 510 (1965). A man has as much right to be left alone in a private telephone booth as in his own home. Doors are placed on telephone booths for no other purpose than to guarantee its occupant privacy. The conduct of the agents in the instant case is all the more flagrantly violative of the individual's right to privacy because the evidence shows that telephone conversations of innocent third persons were also recorded by the agents.

2. WHETHER THE SEARCH WARRANT USED BY THE FEDERAL OFFICERS IN THE INSTANT CASE VIOLATED THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION IN THAT SAID WARRANT WAS (A) NOT FOUNDED ON PROBABLE CAUSE; (B) AN EVIDENTIARY SEARCH WARRANT AND (C) A GENERAL SEARCH WARRANT.

It is quite obvious that if the conversations overheard and electronically recorded by the FBI agents were obtained in violation of the Fourth Amendment, the evidence could not be used to establish "probable cause" for an arrest or a search warrant, since such warrants would be the "fruit of the poisonous tree." When an illegal search and seizure has been made and conducted, and the same is shown by evidence, the burden of proof shifts to the government to show probable cause for such search and seizure, sufficient to justify the same. (*United States* v. *Paroutian*, 299 F.2d 486) Without the illegally obtained evidence, "probable cause" for the issuance of the search warrant did not exist.

A search warrant which authorizes the search for evidence is illegal. It violates both the Fourth and Fifth Amendments to the United States Constitution. With respect to the general nature of the search warrant involved in this case, a mere glance at the permissive scope of the search warrant and the inventory of matters and materials taken from the home of the Petitioner dispels any doubt that the search warrant was not only "evidentiary" in nature but that the warrant was a "general" search warrant, which is condemned. *Stanford* v. *Texas*, 379 U.S. 476, 85 S.Ct. 506, 13 L. Ed 2d 431 (1965)

It is also respectfully submitted that because of the seizure of items not specifically described in the warrant, assuming it was not too general, the entire search must be declared invalid since the validly seized items cannot be severed from the invalidly seized items. See *Marcus* v.

Search Warrants, 367 U.S. 717, 81 S.Ct. 1708, 6 L. Ed 2d 1127 (1961)

3. (A) WHETHER THE FINDING OF GUILTY AS TO ALL COUNTS IN THE INDICTMENT WAS ERRONEOUS IN THAT ONLY ONE OFFENSE, IF ANY, WAS COMMITTED BY PETITIONER AND (B) WHETHER THE INDICTMENT WAS DEFECTIVE IN ALLEGING IN MULTIPLE COUNTS A SINGLE VIOLATION OF TITLE 18, U.S.C. §1084.

In the instant case, Petitioner was found guilty as to all counts charged in the indictment. It is respectfully submitted that such a finding was defective in that the offense denounced by Title 18, U.S.C., Section 1084 is a "continuing offense" and separate acts constituting a single offense cannot be separately charged in the indictment or separately construed as a violation of the statute. *Bell* v. *United States,* 349 U.S. 81, 75 S.Ct. 620, 99 L. Ed 905 (1955)

Section 1084 purportedly punishes the person engaged in the business of betting or wagering or using a wire facility in so doing. Nothing in the statute indicates that a separate telephone call is a separate offense for each use of the wire. In fact, by the nature of the statute, it contemplates a continued use of the wire facilities, since only a continued use would make one a person "in the business."

4. WHETHER THE STATUTE UNDER WHICH PETITIONER WAS CONVICTED IS:

A. *Unconstitutionally vague and*
B. *Unconstitutional in violation of Amendments I and V to the United States Constitution.*

Section 1084 and Section 1952 of Title 18, U.S.C. have been held to be, at the very least, ambiguous as to what

situations they apply. See *United States* v. *Bergland* (C.A. Wis. 1963) 318 F. 2d 159, Cert. Denied, 375 U.S. 861, 84 S. Ct 129, 11 L. Ed 2d 88. The earlier *Bergland* decision (209 F. Supp 547, reversed on other grounds) held that a strict construction must be placed upon the meaning of said statutes.

The criminal statute which fails to define the crime with sufficient certainty violates the constitutional guaranty of due process of law. This "void for vagueness" doctrine was stated in the leading cases of *Conally* v. *General Const. Co.*, 269 U.S. 385, 46 S. Ct. 126, 127, 70 L. Ed 322 (1926) and has been reiterated in *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 86 S. Ct. 518, 15 L. Ed 2d 447 (1966).

The statute involved in the instant case provides, in the first place, that only those "engaged in the business of betting or wagering" are prohibited from doing certain acts. This phrase in itself has no defined meaning, and a person doing any one of the prohibited acts would have to guess whether or not he might come within the purview of Section 1084. Furthermore, unlike the "bookmaking statute," Congress has provided no excise tax on one engaged in the "business of betting or wagering," and is thereby placing impermissible sanctions on a business which may or may not be lawful in an individual State.

Secondly, assuming a person is in the business of betting or wagering, he would be guilty of violating Section 1084, if he transmitted through interstate commerce "information assisting in the placing of bets or wagers on any sporting event or contest." Theoretically, then, any person in the business of betting or wagering, whose conduct otherwise falls within the provisions of the statute, would be subject to imprisonment for two years and a fine of $10,000 if he were to indicate in an interstate telephone conversation that the weather in California was "bright and sunny,"

where the recipient of this information used this information for the purpose of determining what horse to bet on in a forthcoming race on a California race track.

It is further submitted that Congress has set up an unreasonable classification in exempting from the purview of the statute the transmission of the same information for use in news media or for the use of persons living in States where betting is legal to another person in another State where betting is also legal. Article IV, Section 2, of the United States Constitution provides that:

> "The citizen of each state shall be entitled to all privileges and immunities of citizens in the several states."

Equally important is the proposition that the statute infringes on and impedes the right to free speech and penalizes otherwise harmless conversation and transmission of information if the person putting forth the information is "engaged in the business of betting or wagering," whatever this vague phrase means.

Whereas statutes are ordinarily presumed to be valid, when a law appears to encroach upon a civil liberty or a civil right—particularly First Amendment protections such as freedom of speech, press, assembly, etc.,—there is a presumption that the law is invalid. See *Thomas* v. *Collins,* 323 U.S. 516, 65 S. Ct. 315, 89 L. Ed 430 (1945); *United States* v. *Carolene Products Co.,* 304 U.S. 144, 58 S. Ct. 778, 82 L. Ed. 1234 (1938); *West Virginia State Board of Education* v. *Barnette,* 319 U.S. 624, 63 S. Ct 1178, 87 L. Ed. 1629 (1943); *Speiser* v. *Randall,* 357 U.S. 513, 78 S. Ct. 1332, 2 L. Ed 2d 1460 (1958); *Lamont* v. *Post Master General,* 381 U.S. 301, 85 S. Ct. 1493, 14 L. Ed 2d 393 (1965).

It is respectfully submitted that the use of interstate telephone wires, for the potentially innocuous purpose which is declared criminal by Section 1084, is also "almost

as much a part of free speech as the right to use our tongues." *Lamont* v. *Post Master General, supra.*

5. WHETHER AS A MATTER OF FACT AND LAW, THE EVIDENCE WAS INSUFFICIENT TO SUSTAIN THE CONVICTION OF PETITIONER AND PETITIONER'S MOTION FOR A JUDGMENT OF ACQUITTAL WAS ERRONEOUSLY DENIED.

In the instant case, the prosecution was required to establish as part of the corpus delicti of the offense with which Petitioner was charged, that Petitioner was "engaged in the business of betting or wagering."

It is respectfully submitted that as a matter of fact and law, the evidence was insufficient to sustain the conviction of Petitioner as one "engaged in the business of betting or wagering." The most that can be said for the evidence introduced by the prosecution, even assuming all of it is admissible, is that Petitioner engaged in isolated betting or in a series of isolated betting transactions. It seems clear that this type of activity does not constitute the business of betting or wagering; betting of a purely social or friendly type is not within the prohibition delineated by Section 1084. See *United States* v. *Simon*, (C.A. Wis. 1957), 241 F. 2d 308, defining the "business of accepting wagers" in connection with a closely related statute—Internal Revenue Code, Section 4401, dealing with the payment of a wagering tax.)

It should also be remembered that there are no federal common law crimes. The elements of the crime are those set forth in the statute, and the prosecutor has the burden of proving each element. Here, they utterly failed to establish that Petitioner was in the "business of betting or wagering."

Conclusion

Petitioner respectfully submits that a review of the record will indicate that this Petition for Writ of Certiorari should be granted and that the judgment of the Circuit Court affirming the Judgment of the District Court should be set aside and the judgment of conviction reversed.

Respectfully submitted,

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Appendix A

Office of the Clerk
U. S. Court of Appeals
P. O. Box 547
San Francisco 1, Calif.

Nov 17 1966

Burton Marks, Esq.
8447 Wilshire Blvd.
Beverly Hills, Calif.

Dear Sir:

In case No. 20648 *Katz* v. *USA* an opinion was this day filed, in accordance with which a Judgment or Decree was filed and entered judgment of Decree of the Court below.

Pursuant to Rule 26, and unless the mandate is stayed by the order of the Court, or unless a petition for a rehearing of the cause be filed meantime, and as provided by Rule 23, a mandate of this Court will be due to issue on the expiration of 30 days from date hereof.

Time for certiorari petition, Civil cases: 90 days Criminal cases: 30 days.

Sincerely,
Wm. B. Luck
Clerk

Appendix B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 20,648

CHARLES KATZ,
APPELLANT,
v.
UNITED STATES OF AMERICA,
APPELLEE.

[November 17, 1966]

Appeal from the United States District Court for the Southern District of California, Central Division

Before: CHAMBERS and BARNES, Circuit Judges, and POWELL, District Judge

POWELL, District Judge:

The appellant was charged in each count of an eight count indictment with a violation of Title 18 USC 1084.[1] That statute proscribes the interstate transmission by wire

[1] The pertinent part of 18 USC 1084 is as follows:
"(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.
"(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal."

communication of bets or wagers, or information assisting in the placing of bets or wagers by a person engaged in the business of betting or wagering. Each count involved a violation on a different date or at different times on the same date. Appellant waived a jury. The district judge found appellant guilty on all counts.

The appellant moved to suppress evidence in the possession of the government and for the return of the evidence and the dismissal of the indictment. Following a hearing, the motions were denied. On the motion to suppress the evidence was substantially as follows:

In February of 1965 the appellant was seen placing calls from a bank of three public telephone booths during certain hours and on an almost daily basis. He was never observed in any other telephone booth.

In the period of February 19 to February 25, 1965, at set hours, Special Agents of the Federal Bureau of Investigation placed microphones on the tops of two of the public telephone booths normally used by the appellant. The other phone was placed out of order by the telephone company. The microphones were attached to the outside of the telephone booths with tape. There was no physical penetration inside of the booths. The microphones were activated only while appellant was approaching and actually in the booth. Wires led from microphones to a wire recorder on top of one of the booths. Thus the F.B.I. obtained a record of appellant's end of a series of telephone calls.

A study of the transcripts of the recordings made of the appellant's end of the conversations revealed that the conversations had to do with the placing of bets and the obtaining of gambling information by the appellant.

On February 23, 1965, F.B.I. Agent Allen Frei rented a room next to the appellant's apartment residence. He listened to conversations through the common wall with-

out the aid of any electronic device. He overheard the appellant's end of a series of telephone conversations and took notes on them. These notes and the tapes made from the telephone booth recordings were the basis of a search warrant which was obtained to search appellant's apartment. The search warrant called for "* * * book-making records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run-down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings * * *". (See N. 4). The articles seized are described in the return (C.T. 20-22). They are all related to the categories described in the warrant.

During the conversations overheard by Agent Frei, the appellant made numerous comments to the effect that "I have Northwestern minus 7", and "Oregon plus 3." Also, there was a statement by the appellant such as, "Don't worry about the line. I have phoned Boston three times about it today."

At the trial evidence was introduced to show that from February 19 to February 25, 1965, inclusive, the appellant placed calls from two telephone booths located in the 8200 block of Sunset Boulevard in Los Angeles. The conversations were overheard and recorded every day except February 22. The transcripts of the recordings and the normal business records of the telephone company were used to determine that the calls went to Boston, Massachusetts, and Miami, Florida.

The testimony of Joseph Gunn of the Administrative Vice Division of the Los Angeles Police Department, who was the expert called by the government in the area of bookmaking, was that the transcripts of the conversations showed that bets were made and information assisting in the placing of bets was transmitted on the dates and at the times alleged in the indictment. Bets were recorded like

"Give me Duquesne minus 7 for a nickel."[2] Information relating to the line and the acquiring of credit was also transmitted.

In correlating the transcript of the telephone conversations and line sheets and markers found in appellant's residence during the search pursuant to the warrant, Officer Gunn concluded that appellant was placing wagers with a bookmaker for another person for a consideration.

On February 25, 1965, the appellant was arrested. He was advised by a Special Agent of the F.B.I., Emmett Doherty, that he had a right to remain silent, he had a right to consult counsel, and that any statements he made could be used against him in a court of law. The appellant was arrested on the street. He was later present in his apartment where anoother agent of the F.B.I. was involved in the search authorized by the search warrant. Appellant asked when he could have his records back. He stated that without them he was out of business and that he knew no other trade. During this exchange, in response to a question about interstate betting, the appellant said that he could not bet locally because the bookmakers would not pay off.

The next day, which was February 26, 1965, Agent Dono-

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[2] "A. Mr. Katz is playing for somebody else and getting a percentage out of it. When he says he is only getting a dollar, this would mean that on a thousand dollar bet he would be getting a hundred dollars in this instance.

Q. Is he using what is called the nickel system?

A. Yes, sir.

Q. In referring to his bets?

A. Yes.

Q. What is the nickel system?

A. The nickel system is terminology in which a $500 bet would be called a nickel, a $1,000 bet would be called a dime. The $100 bets are usually referred to as a dollar or two dollars.

Also when you record on the nickel system you omit to the right of the decimal point so that $2,500 would be written 25 and two small zeros rather than writing four decimal point zero zero." (RT 240).

van of the F.B.I. met appellant in the lobby of his apartment building to return two personal items which had been taken at the time of the search. Donovan had been with Agent Doherty the day before when Doherty advised the appellant of his rights with respect to statements made to the Federal Agents. Appellant again asked why he could not have his records back. He stated without them he was out of business and that he had been a handicapper and a bettor most of his life. He suggested that if he got his records back he would continue to bet.[3]

From all of the evidence in the case the court found the volume of business being done by the appellant indicated that it was not a casual incidental occupation of the appellant. The court found that he was engaged in the business of betting or wagering at the time of the telephone conversations which were transmitted and recorded. (RT 316, 317).

I. *Recording of Phone Booth Conversations.*

The appellant argues that the evidence obtained at the time of the recording of the appellant's end of the conversations in the phone booth constituted an illegal search and seizure in violation of the Fourth Amendment to the United States Constitution. Appellant urges this on authority of *Silverman* v. *United States,* 365 U.S. 505 (1961), which he says expresses the current attitude of the Supreme Court.

In the Silverman case the agents used a spike microphone which was driven into a party wall. It contacted a heating

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[3] "THE WITNESS: I returned to Mr. Katz a nail file and a key chain. Upon his taking them he said, 'I can replace these for 35 cents. Why can't I have my records? Without my records I am out of business. I have been a handicapper and a bettor most of my life, and it has taken hours and hours and hours of compilation to prepare these records.'

"Mr. Katz continued as to the time factor in the records, and then suggested that if he could have his records back he would continue betting. And he facetiously made the comment, 'Then I can lead you to the big ones.'" (RT 219, 220).

duct of the house occupied by the petitioners. This enabled the agents to hear conversations in the entire house, including conversations on the telephone. The case was reversed because of the invasion into a "constitutionally protected area." The court said, "the officers overheard the petitioner's conversation only by usurping part of the petitioner's house or office." (365 U.S. at 511). It was held to be a violation of the petitioner's Fourth Amendment rights.

Appellant cites cases which we have considered. In *People of the State of California* v. *Hurst,* 325 F. 2d 891 (9 Cir. 1963), there was an unlawful invasion of premises used as a residence. We do not consider *Lopez* v. *United States,* 373 U. S. 427 (1963), as authority sustaining appellant's position as that case sustained the right to record a conversation between a government agent and the suspect. *United States* v. *Paroutian,* 299 F. 2d 486 (2 Cir. 1962), was reversed because a search of an apartment without a warrant produced evidence later used to search the same apartment after the defendant's right to possession had terminated. This last case would apply only if we found that the evidence obtained by the recording of the phone conversations here was in violation of appellant's Fourth Amendment rights. This we decline to do.

The public phone booth was used by appellant, who argues that when he occupied it for the purpose of engaging in a personal conversation and closed the door to the booth, he is in effect in his own residence. By invitation from the telephone company and the payment of the toll he says he is entitled to consider the booth protected from intrusion by the Fourth Amendment. In *Smayda* v. *United States,* 352 F. 2d 251 (9 Cir. 1965), police officers observed events in a stall in a public toilet through a camouflaged hole in the ceiling. The court held that this was not a violation of the Fourth Amendment rights of the defendants on

two grounds, 1) the appellants impliedly consented to the search when they carried on their illegal acts in a public toilet, and 2) there was no unreasonable search within the meaning of the amendment. 352 F. 2d at 253, 256.

In *Olmstead* v. *United States*, 277 U.S. 438 (1928), evidence was introduced which was obtained by tapping the wires of the telephones used by petitioners. It was held that the use of the evidence did not violate the Fourth Amendment rights of defendants.

In *Goldman* v. *United States*, 316 U.S. 129 (1942), federal agents were permitted to testify to conversations overheard by the use of a detectaphone applied to the walls of a room adjoining the office of the defendant. This is similar to the instant case. It was held not to be an invasion of defendant's office.

In the recent case of *Corngold* v. *United States*, — F. 2d— (9 Cir. Sept. 29, 1966), the appellant objected to the evidence obtained by the use of a "scintillator", an instrument sensitive to radiation. Customs agents saw appellant carrying packages into his apartment. The officers observed the appellant and two other men carrying packages from the apartment to the appellant's car. They followed the appellant as he drove to the Los Angeles International Airport. The scintillator, when used outside of the appellant's apartment, and while following appellant's car, reacted so as to indicate that there was a radioactive substance in the possession of the appellant. The court there said:

> "Appellant contends that the walls of his apartment were 'penetrated' and his apartment was searched by means of the scintillation detector in violation of his Fourth Amendment rights, and that it was error to admit evidence obtained in this way.

"The agents entered the apartment building through an unlocked public entrance. They employed the scintillator in public hallways outside appellant's apartment. Goldman v. United States, 316 U.S. 129 (1942), is controlling authority that appellant's Fourth Amendment rights were not violated. See also On Lee v. United States, 343 U. S. 747, 752-54 (1952)."

The Corngold case sustains the government in the use of the evidence obtained by microphones and tape recordings of the telephone conversations of the appellant in this case. There was no physical entrance into the area occupied by appellant. The Corngold case was reversed on the ground that the agents were not authorized to search the packages in the airport terminal without a search warrant. Here a search warrant was obtained and executed.

II. *The Search Warrant.*

The search warrant described the items to be seized which were instrumentalities of the offense.[4] It is our conclusion that the search warrant does adequately describe the property to be seized. It was not general nor did it describe mere evidentiary matter.

In *Gilbert* v. *United States,* 291 F. 2d 586 (9 Cir. 1961), this court held that the search was unreasonable when government agents allegedly maneuvered to make the arrest of the defendant in his home. No offense was committed in the presence of the arresting officer. The crime

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[4] "* * * there is now being concealed certain property, namely bookmaking records, wagering paraphernalia, including but not limited to, bet slips, betting markers, run down sheets, schedule sheets indicating the lines, adding machines, money, telephones, telephone address listings which are designed and intended for use as the means of committing criminal offenses in violation of Title 18, United States Code Section 1084, and violations of 441, 4412 and Section 7203 of the Internal Revenue Code.* * *" (Vol. 1, CT 17).

charged was the forgery of a check which the government had in its possession. The items seized were checks and income tax returns which were evidentiary only and not instrumentalities of the crime charged.

We have reviewed the authorities cited by the appellant. The case of *United States* v. *Clancy,* 276 F. 2d 617 (7 Cir. 1960); (reversed on other grounds in 365 U.S. 312), more nearly resembles the fact situation here. The search warrant described the property to be seized as in this case.[5]

In *Leahy* v. *United States,* 272 F. 2d 487, 491 (9 Cir. 1959), concerning a search, this court stated as follows:

> "* * * The revenue agents in the instant case seized an adding machine, a telephone, record books, receipts, pencils, pens, money and the keys to safety deposit boxes, as well as a number of rifles, shotguns and pistols. It is clear from the items seized that the search was specifically directed to the instrumentalities used in the commission of the crime of unlawfully engaging in the business of wagering. The records of an illicit business are instrumentalities of crime. Marron v. United States, 1927, 275 U. S. 192, 48 S. Ct. 74, 72 L. Ed. 231 (officers incident to arrest may lawfully seize account books and papers used in carrying on the criminal enterprise.) Such were the records obtained in this case. The search was, therefore, a reasonable one."

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[5] "* * * divers records, to wit, books, memoranda, tickets, pads, tablets and papers recording the receipt of money from and the money paid out in connection with the operation of a wagering business on said premises, such files, desks, tables and receptacles for the storing of the books, memoranda, tickets, pads, tablets and papers aforesaid, and divers receptacles in the nature of envelopes in which there is kept money won by patrons * * * and divers other tools, instruments, apparatus, United States currency and records * * *". (276 F. 2d at 624).

The search warrant was valid and the court was correct in refusing to suppress the evidence obtained on the search.

III. *The Indictment.*

Counsel argues that there was a single violation under the statute, 18 USC 1084. This is not borne out by the record as we view it. Each call was a separate act of the defendant in using the telephone and would constitute a separate and distinct offense.

In construing a related statute to 18 USC 1084, the court in *United States* v. *Teemer*, 214 F. Supp. 952, 958 (N.D. W.Va. 1963), said:

> "* * * (T)he 'course of conduct' referred to in the * * * legislative history of setcion 1952, refers to the nature of the business promoted or facilitated—and not to the essence of the federal offense, which is 'travel'. The phrase seems to refer to the fact that the Act was designed to attack an entrenched operation rather than a sporadic poker game or floating crap game. No act of travel is to be deemed unlawful unless the enterprise is a continuing one; but once the continuity of the enterprise is established, any act or travel, * * * is a daily or regular event, and thus, perhaps, a 'continuing' activity. * * *"

Mitchell v. *United States*, 142 F. 2d 480 (10 Cir. 1944), was an appeal from a conviction of mail fraud. It was held that a continuing scheme once established may support additional charges of violation of the statute. Each act of mailing would constitute a separate and distinct offense once the scheme was established. That would be the case here, as was found in the Teemer case supra under 18 USC 1952.

IV. *Constitutionality of 18 USC 1084.*

Appellant urges that the statute is unconstitutional in that it is indefinite, vague and uncertain, and therefore violates the Fifth Amendment. In support of his argument that this statute is void for vagueness, appellant quotes language from the recent case of *Giaccio* v. *Pennsylvania,* 382 U. S. 399 (1966). The statute involved there was an 1860 law of Pennslyvania that permitted the taxing of costs against a defendant acquitted in a criminal case. A reading of that statute shows that it fixed no standards for its application. It was vague and uncertain.

In *Turf Center, Inc.* v. *United States,* 325 F. 2d 793, 795 (9 Cir. 1963), this court held 18 USC 1952 as not void for vagueness. That section is similar to and a companion section to 18 USC 1084.

> "A statute meets the standard of certainty required by the Constitution if its language conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices. * * * The fact that in some cases it may be difficult to determine the side of the line on which a particular fact situation falls is not sufficient reason to hold the language too ambiguous to define a criminal offense. * * *"

We do not consider the authorities cited by the appellant as sustaining his position that this statute is void or that it interferes with the right of free speech. The plain and unambiguous language used in the statute is entitled to its ordinary and reasonable interpretation. This statute meets the standard of certainty required by the Constitution.

V. *Sufficiency of the Evidence.*

A complete review of the record has been made. The evidence was detailed and not substantially disputed. The defendant presented no testimony. We are convinced that there was sufficient evidence to sustain the conviction of the defendant.

The judgment of conviction is affirmed.

Appendix C(a)

§ 1084. Transmission of wagering information; penalties

(a) Whoever being engaged in the business of betting or wagering knowingly uses a wire communication facility for the transmission in interstate or foreign commerce of bets or wagers or information assisting in the placing of bets or wagers on any sporting event or contest, or for the transmission of a wire communication which entitles the recipient to receive money or credit as a result of bets or wagers, or for information assisting in the placing of bets or wagers, shall be fined not more than $10,000 or imprisoned not more than two years, or both.

(b) Nothing in this section shall be construed to prevent the transmission in interstate or foreign commerce of information for use in news reporting of sporting events or contests, or for the transmission of information assisting in the placing of bets or wagers on a sporting event or contest from a State where betting on that sporting event or contest is legal into a State in which such betting is legal.

(c) Nothing contained in this section shall create immunity from criminal prosecution under any laws of any State, Commonwealth of Puerto Rico, territory, possession, or the District of Columbia.

(d) When any common carrier, subject to the jurisdiction of the Federal Communications Commission, is notified in writing by a Federal, State, or local law enforcement agency, acting within its jurisdiction, that any facility furnished by it is being used or will be used for the purpose of transmitting or receiving gambling information in interstate or foreign commerce in violation of Federal, State or local law, it shall discontinue or refuse, the leasing, furnishing, or maintaining of such facility, after reasonable

notice to the subscriber, but no damages, penalty or forfeiture, civil or criminal, shall be found against any common carrier for any act done in compliance with any notice received from a law enforcement agency. Nothing in this section shall be deemed to prejudice the right of any person affected thereby to secure an appropriate determination, as otherwise provided by law, in a Federal court or in a State or local tribunal or agency, that such facility should not be discontinued or removed, or should be restored. Added Pub.L. 87-216, § 2, Sept. 13, 1961, 75 Stat. 491.

Appendix C(b)

AMENDMENT I—FREEDOM OF RELIGION, SPEECH AND PRESS; PEACEFUL ASSEMBLAGE; PETITION OF GRIEVANCES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

Appendix C(c)

AMENDMENT IV—SEARCHES AND SEIZURES

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Appendix C(d)

AMENDMENT V—CAPITAL CRIMES; DOUBLE JEOPARDY; SELF-INCRIMINATION; DUE PROCESS; JUST COMPENSATION FOR PROPERTY

"No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; . . ."